



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Mr. Michel Munguia
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR95-1177

Dear Mr. Munguia:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35465.

The General Services Commission (the "commission") received a request for the price list for "Class 885 N1 (boiler and cooling chemicals) for the vendor DIVERSEY and if available for NALCO." You state that the commission released the requested information for NALCO but because Diversey Water Technologies Inc. ("Diversey") had marked its information "confidential," and Diversey's general counsel had sent a letter denying the commission authorization to disclose the price lists, you claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the exception(s) you claimed and have reviewed the documents at issue.¹

Pursuant to section 552.305 of the Government Code, this office informed Diversey of the request and of its obligation to claim the exceptions to disclosure it believes apply to the requested information, together with its arguments as to why it believes the claimed exceptions apply. Diversey did not respond. We will therefore consider only the exceptions that the commission has claimed.

¹We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.,* Open Records Decision No. 180 (1977).

Section 552.104 of the Government Code excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. As the contract has already been awarded and is currently in effect, section 552.104 does not except the requested information from required public disclosure.

Section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

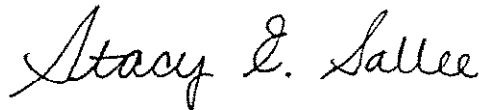
RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552

(1990) at 5.² In this case, the commission has taken no position as to whether the submitted information is a trade secret. However, Diversey has not established a prima facie case that this information is a trade secret. Therefore, the commission may not withhold the requested information under the trade secret prong of section 552.110.

To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. As the commission has not demonstrated that a statute or judicial decision excepts this information from disclosure, we conclude that this information is not excepted by the second part of section 552.110 of the Government Code. For these same reasons, we conclude that the requested information is not excepted from disclosure under section 552.101 of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Ref.: ID# 35465

Enclosures: Submitted documents

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

cc: Ms. Rosanne McDonald
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